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No. 90-1650

Supreme Court, U.S.
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In The Supreme Court Of The United States

October Term, 1990

JOHN W. DENNISON,

Petitioner,

v.

COUNTY OF FREDERICK, VIRGINIA,
and
KENNETH Y. STILES, Individually and in his capacity as Chairman of the Frederick County Board of Supervisors,
and
JOHN R. RILEY, Individually and in his capacity as County Administrator of Frederick County, Virginia,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Dennison, in connection with his rights under the First Amendment of the United States Constitution, identified any "speech" which involved matters of "public concern" which he claimed was a motivating factor in his constructive discharge?

2. Whether the speech identified by Dennison in the conduct of his position as Building Official, which he claimed was a motivating factor in his constructive discharge, involved matters of public concern protected by the First Amendment of the United States Constitution?

3. Whether the United States court of appeals for the Fourth Circuit erred in deciding that the dispute between

Dennison and the County was a private matter between employer and employee and therefore that Dennison's speech did not involve a matter of public concern?

4. Whether Dennison's Fourteenth Amendment rights of due process under the United States Constitution were violated by the Respondents (i) for failing to give him any pretermination "notice of charges and an opportunity to respond", and further, (ii) in connection with the post-termination procedure, by providing that the three member fact-finding panel would be chosen from a group of five persons selected solely by the County of Frederick?

5. Whether the Federal Trial Court erred in applying preclusive effect to the decision of the Circuit Court of

Frederick County, Virginia, on the "grievability" issue when there was no opportunity as a matter of law to appeal or have any higher Court review the State Court decision?

6. Whether Dennison had a "full and fair opportunity" to litigate the grievability issue in the Frederick County Circuit Court proceeding when, in fact, as a matter of law, there was no right to appeal the decision by the State Court Judge, such decision being the first and only judicial decision in connection with the grievability issue in that cause?

THE PARTIES

The parties to the appeal before the United States Court of Appeals for the Fourth Circuit were John W. Dennison, Plaintiff - Appellant and the County of Frederick, Virginia, Kenneth Y. Stiles, individually and in his capacity as Chairman of the Frederick County Board of Supervisors and John R. Riley, individually and in his capacity as County Administrator of Frederick County, Virginia, Defendants - Appellees. Said parties are the same as were before the Court of original jurisdiction, the United States District Court for the Western District of Virginia, Harrisonburg Division.

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ORDERS AND OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit sought to be reviewed is published, 921 F.2d 50 and is reproduced in the Appendix, infra, p. 1 - 23. An Order on a Petition for Rehearing was entered in the case by the Court of Appeals on January 25, 1991 and is reproduced in the Appendix, infra, p. 24. The District Court Opinion is published, 726 F.Supp. 137 and is reproduced in the Appendix, infra, p. 25 - 40. The Order of the District Court dismissing the case was entered on December 1, 1989, and is reproduced in the Appendix, infra, p. 41 - 42. The Order of the District Court denying Dennison's Motion for Reconsideration was entered on 1/12/90 and is reproduced in the

Appendix, infra, p. 43. The District Court's oral ruling in denying the Petition for Reconsideration is reproduced in the Appendix, infra, p. 44 - 54. The Order of the Circuit Court of Frederick County, Virginia denying Dennison's grievability claim is reproduced in the Appendix, infra, p. 55 - 58.

JURISDICTIONAL STATEMENT

Jurisdiction is evoked pursuant to 28 U.S.C. Section 1254(1). The Court of Appeals judgment was entered on December 19, 1990. The Petition for Rehearing was timely filed. It was denied by Order of January 25, 1991. The instant Petition For Writ of Certiorari is timely filed pursuant to Rules 29.2 and 29.3 of the Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and the Fourteenth Amendment, Section 1 of the United States Constitution are involved herein. Additionally, 42 U.S.C. Section 1983 is also involved.

The First Amendment provides that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The applicable provision of the Fourteenth Amendment is:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983 provides as follows:

> §1983. Civil action for deprivation of rights.
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Additionally, Sections 7.2, 7.4, 12.2 and 12.3 of the "Manual for the Employees of the County of Frederick, Virginia" (hereinafter "Manual") are involved and are set forth in the Appendix, infra, p. 67 - 70. Additionally, Sections 103.1, 113.2 and 113.3 of the Virginia Uniform Statewide

Building Code (hereinafter "VUSBC") are also involved and are set forth in the Appendix, infra, p. 65 - 66. Finally, Sections 2.1-114.5:1 (D) (4) and 2.1-114.5:1 (E) of the Virginia State Code are also involved and the pertinent part of each is set forth in the Appendix, infra, p. 63 - 64.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

This case arises from a §1983 action filed by John W. Dennison ("Petitioner") on September 29, 1988 in the United States District Court for the Western District of Virginia. The principal claims set forth in such suit were that Dennison was constructively discharged from his job as the "Building Official" of Frederick County, Virginia

(i) in violation of his First Amendment rights on the grounds that such constructive discharge by the County was in retaliation for certain "speech" of Dennison protected by the First Amendment and (ii) in violation of his Fourteenth Amendment rights on the grounds that Dennison had no pre-termination notice of the charges against him, nor opportunity to respond thereto, and further, that the post-termination procedure did not provide for an impartial fact-finding panel.

Several days before the scheduled start of the trial, the Trial Judge dismissed Dennison's case on the sole basis of a res judicata plea filed by Defendants. The basis for such plea was the fact that the Circuit Court of Frederick County, Virginia had ruled

that Dennison's claim, in connection with the grievance proceeding, was "non-grievable".

Dennison argued to the Federal Trial Judge that the principle of res judicata was inapplicable since he did not have a "full and fair" opportunity to litigate the grievability issue in the State Court because, as a matter of law, there was no right to appeal the decision of the State Judge. The "non-grievability" decision by the State Circuit Judge was the first and only judicial proceeding of any kind in connection with the County grievance procedure. Dennison appealed the Trial Court's dismissal to the United States Court of Appeals for the Fourth Circuit.

Defendants ("Respondents"), in their Brief filed in the Fourth Circuit,

argued that there were other grounds on which the dismissal should be sustained if the Court of Appeals concluded that the Trial Court erred in dismissing the suit on the res judicata plea. The Fourth Circuit, expressing strong reservations and doubt about the basis on which the Trial Court dismissed Plaintiff's suit, sustained the dismissal of Dennison's claim on a different basis, namely, that summary judgment was appropriate because Dennison's speech did not involve a matter of public concern, and further, because Dennison's discharge met the due process requirements of the Fourteenth Amendment. This appeal results from such decision by the United States Court of Appeals.

II. MATERIAL FACTS OF THE CASE

John Dennison served as the Build-

ing Official[1] of Frederick County, Virginia from December, 1981 until September 30, 1986 when he orally resigned his position as the result of the intentional creation by the County of Frederick ("County") of an intolerable working situation. Such oral resignation was made shortly after 4:00 P.M. on the afternoon of September 30, 1986.

Just before 4:00 P.M. Dennison was summoned to the Office of the County Administrator, John Riley ("Riley"), by Dennison's department head, Robert

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[1]As the Building Official, Dennison was charged, under §103.1 of the Virginia Uniform Statewide Building Code, with the legal responsibility of enforcing such Code.

Watkins ("Watkins"). Dennison was not advised of the purpose in being called to Riley's office. When he arrived at Riley's office, he was told that he was immediately being placed on probation. Upon being informed of this, Dennison then orally resigned his position as Building Official. Such oral resignation was immediately accepted by Riley.

Unbeknownst to Dennison, on the early afternoon of September 30, the Chairman of the Board of Supervisors, Kenneth Stiles, ("Stiles") had learned of the excellent six month evaluation that Dennison received on September 9, 1986. As soon as Stiles learned of this he then went immediately to Riley's office and "blew the roof off the building" regarding such excellent evaluation. Shortly thereafter, Riley

then summoned Watkins to his office and together they then changed what was an excellent evaluation of September 9th into a very poor evaluation and Riley then wrote on the "revised evaluation" form that Dennison was being placed "on probation for six months effective 9/30/86". As soon as the "revised evaluation" was completed, Watkins was then told to summon Dennison to Riley's office, which he did. Dennison, as noted above, resigned shortly thereafter when he was told by Riley that he was immediately being placed on probation for six months.

The act of placing Dennison on probation on September 30, 1986 and of redoing his evaluation was beyond the authority of the County. Nowhere in the "Manual for the Employees of Frederick

County, Virginia" (and this "Manual" sets forth the rules and procedures that apply both to the County and to its employees) is the County given the authority to place an employee on "probation" once he completes his original six month probationary period as Dennison had many years before. (There are specific ways in which the County can discipline an errant employee but "probation" is not one of them.) Additionally, the County neither had the authority nor the facts to change or redo Dennison's evaluation on September 30, 1986. As provided in §7.2 of the "Manual" evaluations are done every six months and once they are agreed to by the employee (§7.4 of the "Manual") and the supervisor (Watkins), they then become final and unassailable.

Dennison's six month evaluation was completed, and agreed to by him, as of September 9, 1986.

Dennison's problems with the County started in the summer of 1984. At or just before this time, Dennison started to receive, on a constant basis, which continued up through September 30, 1986, various general "messages and urgings" to back off in the strict but proper enforcement of the Building Code. These messages would include occasions when he, or members of his department, would be called out by high-ranking county officials to justify the "correction orders" that had been written in reference to violations of the Building Code. On these and other occasions, comments would be made by these officials, sometimes in the presence of the builder

involved, that the inspectors in issuing the "correction orders" were "nit-picking" or "not using common sense" in the enforcement of the VUSBC. Additionally, Riley would make statements to Dennison on these or other occasions (i) that "Richmond (meaning the General Assembly) doesn't tell Frederick County what to do" in connection with the VUSBC, (ii) that the "good old boy" system should be used in reference to the Building Code and, finally, (iii) that Frederick County is not "Fairfax or Henrico", in reference to the enforcement of the Code.

Dennison and the other inspectors in the office were being called out to justify these "correction orders" despite the fact (and Riley admitted this) that every complaint about too

strict enforcement that was ever investigated was determined to be "unfounded". Also, Dennison's interpretation of the Code was acknowledged by Riley to be correct in at least 99% of the cases. The fact that Dennison and the other inspectors were being constantly called out to justify their position was, in and of itself, an indication of the County's general "unhappiness" with the strict enforcement.

Notwithstanding all of these general "messages and urgings", Dennison continued to strictly enforce the Code and told the inspectors in his office to do likewise.

It was also during the summer of 1984 that Dennison learned that the General Electric Corporation was installing new equipment in its building

situate in Frederick County without the necessary permits. (Both the State Attorney General's Office and the State Housing Office supported Dennison's position that the Virginia Uniform Statewide Building Code [VUSBC] applied to such equipment.) Dennison advised General Electric that the installation of such equipment was within the jurisdiction of the Building Code and therefore must be in compliance with such Code. After many months of discussion, including Riley's statement to Dennison that if Dennison persisted in attempting to apply the VUSBC in this instance, Stiles "would come down hard on Dennison's department", Dennison then received an express written directive from Riley not to communicate further with General Electric on the issue of this

equipment. This directive was received during the summer of 1985.

While the General Electric matter was going on, and in connection with the "general messages" Dennison was receiving to back off in the strict but proper enforcement of the Code, one of the building inspectors (Rick Chappell) in Dennison's department seemed to be drawing a lot of the fire from the builders regarding what they claimed to be "too strict" enforcement of the Code. The chief complaint against Chappell seemed to be that he was writing too many "correction orders" and in connection with these "correction orders" it was suggested that Chappell had an "attitude problem". Dennison strongly supported Chappell in his proper enforcement of the VUSBC (every complaint

that was ever investigated against the Inspections Department was determined to be "unfounded") and refused to allow complaints about Chappell's "attitude" to be used as a vehicle to diminish the strict but proper enforcement of the law.

The situation involving Mr. Chappell reached a "head" in October, 1985 when a meeting was arranged for all the builders to come and voice whatever complaints or criticisms they had about the Inspections Department, particularly those matters which related to their claims of "too strict enforcement". At this meeting, Dennison was told not to make any statements. When a comment was made by one of the builders about Mr. Chappell's "attitude" (and "attitude" complaints were the way in which

builders attempted to attack Chappell's strict enforcement of the law), Dennison did stand up and make the following comment: "If Mr. Chappell quit writing correction orders would his attitude get better?" After Dennison made this statement, he was then given a message, originating from Mr. Stiles, to leave the meeting.

Shortly after this builders meeting of October 25, 1985, Dennison prepared a written response, to be published in a local newspaper, to the various complaints made at this meeting, particularly those complaints about the alleged "too strict enforcement" of the Code. An earlier report of the meeting had been carried in such local paper. Dennison told Riley that he wanted to

publish this response in the newspaper but Riley refused.

The County, in giving Dennison the message to back off in the "strict but proper enforcement" of the VUSBC, usually would not give a direct order but instead would indicate displeasure with the strict but proper enforcement of the Code. In the summer of 1985 Dennison was, however, specifically asked by Stiles if he could forget about the enforcement of the Building Code in connection with the handicapped bathroom requirement regarding a commercial job being done by a Mr. James Wilson. Dennison refused.

In November/December, 1985, the County created a new position, Director of Code enforcement. The duties of this new position included that of "Building

Official". The educational qualifications for this position (college degree) went well beyond Dennison's educational level since he had only completed the eighth grade. If someone had actually been appointed to this position, Dennison would have been "ousted" as Building Official. Shortly after the position was created, the County had the secretary to the Board of Supervisors check into the legal difficulties that were encountered by a neighboring county when they attempted to improperly oust their building official. After the County got the report of those legal difficulties, they took no further action with respect to this new position. Riley acknowledged during the grievance proceeding that he had understood that Stiles' sole purpose in creating this new position

was to give the title of "Building Official" to this new position.

The next significant event in the case occurred in March, 1986 when Dennison was told by Riley, just before the Inspections Department moved to a different location in the County Office Building, to use "suggestion lists" instead of "correction orders" (as provided in the VUSBC) in reference to any Code violations. Dennison refused this request. If Dennison had followed the request of Riley and used "suggestion lists" instead of "correction orders", the enforcement provisions of the VUSBC would have been completely emasculated because "correction orders", pursuant to §§113.2 and 113.3 of the VUSBC, are a condition precedent to any enforcement of the VUSBC.

Immediately after this March "suggestion list" incident, the County then started its "reorganization" of the Inspections Department. In connection with such reorganization, Dennison was stripped of certain administrative and other responsibilities, including the preparation of the budget, was told that he could no longer tell his secretaries directly what to do but instead had to go through a "floor coordinator" and finally, was advised that he could not go out in the field with the Plans Reviewer. Dennison told his superiors that all these "reorganizational efforts" were substantially impairing the efficiency of his department. These expressions by Mr. Dennison were, however, ignored by the County and the "reorganization" remained in place as

long as Dennison served as the Building Official.

After he orally resigned his position in the late afternoon of September 30, 1986 when he was advised that he was immediately being placed on probation, Dennison did offer to stay in his position (since with his resignation the "probation" would be stopped in its place) until the end of October. On Friday, October 3, 1986, Dennison was advised by Watkins that he should not return to the office after that date. During that conversation, Watkins made a statement to Dennison (which was heard by the Plans Reviewer, Donna Ritter) that "you were right, all this was done to either control you or to get rid of you".

Dennison, as a formality, on or after October 10, 1986 caused to be delivered to Riley's office a letter of resignation that was dated October 3, 1986. In fact, Dennison's oral resignation of September 30 was accepted at that time. Furthermore, on October 9, 1986 the County sent Dennison a letter of that date saying that his "resignation" had already been accepted. Also, between September 30, 1986 and October 10, 1986, Dennison did consult a lawyer but that was about a "release" document that the County wanted him to sign. (Very clearly the County, at that early date, realized their wrongdoing and by seeking the execution of the "release" were attempting to avoid any liability.)

After October 3, 1986, the "March reorganization" of the Inspections

Department was completely rescinded and the new Building Official, Kenneth Coffelt, who was given direct authority over the secretaries, was allowed to go out in the field with the Plans Reviewer and was given the administrative authority that had been stripped from Mr. Dennison in the operation of his department. Additionally, and most significantly, Mr. Coffelt, who was appointed the new Building Official by the County, understood the "messages and urgings" that the County had put out about the lax enforcement of the Building Code. (App. 94 - 101). For example, on various occasions, Coffelt told the inspectors in his department not to enforce certain provisions of the Building Code and further, and even more significantly, Coffelt ignored for over

two years (despite the fact that he was given express information regarding same) the Building Code violations that were being "approved" by the "third party inspectors". It wasn't until such violations became known to members of the public that Coffelt was then forced to fire the third party inspectors. These firings, however, occurred more than two years after he was given express notice of these violations. After such firings, Coffelt then told the inspectors to go "easy" on certain builders who had been using such third party inspectors.

Finally, and most significantly, the record in this case demonstrates, without question, that Dennison did an excellent job as Building Official. Such evidence includes the following:

(i) the fact that every evaluation that was done of Dennison by the County before September 30, 1986 (and these were done every six months) gave Dennison excellent marks as Building Official, (ii) the fact that every complaint that was ever investigated against the Inspections Department was determined to be "unfounded" (Riley, himself, admitted this fact), (iii) the fact that the State Housing Office ranked Dennison's Inspections Department as one of the better offices in the State, (iv) Riley's admission during the Grievance Proceeding that he would favorably compare Dennison's knowledge of the State Building Code with that of any other Building Official in Virginia, (v) the admission by Robert Watkins that he admired the way Dennison dealt with

members of the public and with members of his staff (vi) that Dennison was never disciplined in any manner prior to September 30, 1986, and (vii) the admission by the County's lawyer during the Grievance Proceeding that Dennison was the type of person he would want enforcing the Building Code in the county where he lived.

ARGUMENT

POINT I

> Dennison identified, under oath, both specific and general speech, which involved matters of "public concern" which he claimed to be a motivating factor in his constructive discharge.

It is, of course, fundamental that speech which involves a matter of "public concern" is protected by the First Amendment. Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708

(1983). This protection would also apply to private statements, involving matters of "public concern", made by a public employee to his superior. Givhan v. Western Line Consol. School, 439 U.S. 410, 99 S.Ct. 693, (1979). In fact, and this only serves to underscore the fundamental importance of the First Amendment in our society, the United States Court of Appeals for the Fourth Circuit, citing cases decided by this Court, said that "(o)ne of the fundamental rights secured by the Amendment (First Amendment) is that of free, uncensored artistic expression - - even on matters trivial, vulgar or profane". Berger v. Battaglia, 779 F.2d 992, 1000 (4th Cir. 1985). Finally, in considering a summary judgment motion (and this is the basis on which the

Court of Appeals sustained the dismissal of Appellant's case), the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

In paragraphs 7 and 8 of his Amended Complaint, Dennison alleges that his constructive discharge was in retaliation for, and motivated by, his strict but proper enforcement of the VUSBC. During his Deposition, which was taken by Defendants' Counsel on July 24, 1989, Dennison affirmed, under oath, the basic accuracy of the matters set forth in such Amended Complaint. (App. 72 - 73). Additionally, also during such deposition, Dennison swore, under oath, to the basic proposition that the "Defendants did cause (Dennison) to

resign because (he) had been "properly but thoroughly enforcing the Building Code of the State of Virginia within such Frederick County, such enforcement being contrary to the intent of such Kenneth Y. Stiles and/or John R. Riley". (App. 73 - 75).

In response to question #8 in Defendants' "First Interrogatories" (and in this question Dennison was asked to identify "each and every activity you contend is protected by the First Amendment and which led to your 'constructive discharge' as alleged in paragraph 7 and 8 of the Amended Complaint") Dennison stated, under oath that,

> "I did, and continued to do so during my time as building official, properly and thoroughly enforce the Building Code of the State of Virginia.

> Such action, which included public speech and conduct, was taken by me in connection with the matters that I was directly involved with and in my instructions and directions and communications with the staff in the Inspection's Department. Additionally, see the depositions that have been taken in this cause. In enforcing the Building Code I engaged in actions, communications and conduct with members of the public over the entire period of time that I was the building official and also engaged in such actions, communications and conduct in communications with members of my staff to see to the proper but thorough enforcement of the Building Code". (emphasis ours).

Dennison, as noted in such interrogatory response, incorporated the answers that he had given on this same subject in the "depositions that have been taken in this cause", which would, of course, include the answers on this issue that were given by Dennison in the deposition

conducted by Defendants on July 24, 1989. (This interrogatory response was served on Defendants on July 31, 1989 which was, of course, seven days after Dennison's deposition of July 24. There was no need to reitemize in the interrogatory response [other than by "incorporation"] those same matters that had already been testified to by Dennison, under oath, seven days beforehand).

At the July 24, 1989 Deposition, in response to a question from Defendants' Counsel to identify any instances where he was specifically directed not to enforce the Code, Dennison stated, under oath, that he was so specifically directed by Riley not to enforce the Building Code in connection with the "GE matter". (App. 75). Dennison also testified during this same deposition

that Stiles had asked him not to enforce the Building Code in connection with the "Wilson incident" (App. 40, 76).

In response to Defendants question during the same deposition to identify "protected speech" that he claimed was a motivating factor in his discharge, Dennison again identified the GE incident (App. 87), the matters involving the builders' meeting of October, 1985 (App. 71 - 72, 86 - 87) and finally, the "suggestion lists" incident of March, 1986 (App. 90 - 92). At the July 24 deposition, prior to identifying these specific instances of "protected speech" that were a motivating factor in his discharge, Dennison testified, under oath, in response to questions from Defendants' Counsel, about the "general messages" that he received to back off

in the strict but proper enforcement of the Building Code which included, (i) from the summer of 1984, being called out to the field on a regular basis (sometimes 4 or 5 times a month) to justify the "correction orders" written by the inspectors and then being told they were "nitpicking" and "not using common sense" in the enforcement of the Code, (App. 79), and (ii) the statements by Riley that "Richmond doesn't tell Frederick County what to do" in reference to the VUSBC. (App. 92).

Very clearly, both specific and general instances of "protected speech" were identified by Dennison as motivating factors in his "constructive discharge". On a summary judgment motion the sworn statements of the non-moving party, whether they be by affidavit or

in a deposition, are accepted as true and are sufficient to defeat such motion. Perry v. Sindermann, 408 U.S. 593, 596, 92 S.Ct. 2694, 2696 (1972). (affidavits were very short and essentially repeated the general allegations of the complaint). In fact, the Fourth Circuit itself set forth what is the correct rule in a summary judgment context on matters of "intent" when it said, "summary judgment is seldom appropriate in cases in which particular states of mind are decisive elements of claim or defense, because state of mind is so often proved by inferences from circumstantial evidence and by self serving direct evidence". Magil v. Gulf and Western Industries, Inc., 736 F.2d 976, 979 (1984). (Emphasis ours).

Separate and apart from the sworn statements of Dennison in the record regarding the motivation of the County in his constructive discharge, there certainly is ample evidence from which a jury could conclude that the intentional creation of an intolerable situation by the County of Frederick was motivated by their displeasure with Dennison's strict but proper enforcement of the Building Code. For example, the evidence is overwhelming that Dennison did an excellent job as Building Official and therefore his only "sin" in the eyes of the County (and therefore their motivation for the constructive discharge) would have been such strict enforcement of the Building Code. (It is clear, from the matters as set forth hereinbefore, that the County was very

unhappy with such strict enforcement.) Additionally, it is obviously significant that as soon as Dennison resigned his position as Building Official, the March "reorganization" was rescinded and the various powers and authority of the Building Official were then restored including his ability to directly tell the secretaries in his office what to do and his ability to go out in the field with the Plans Reviewer (which was necessary in the proper conduct of his office). Finally, the direct admission by Robert Watkins, Dennison's immediate Supervisor, that "all this was done to either control you or get rid of you" would be sufficient, in and of itself, to deny any summary judgment motion. A jury, of course, could conclude that the County knew it

was acting unlawfully, and wihout authority, in placing Dennison on probation and in redoing his evaluation.

The displeasure of the County with Dennison's strict enforcement of the law is very clear from the record including: (i) statements from Riley that Frederick County doesn't follow Richmond and that Frederick County is not Fairfax or Henrico when it comes to the Building Code; (ii) Dennison's replacement by a person who did not enforce the Building Code (App. 95 - 102); (iii) the recision of the reorganization as soon as Dennison left; (iv) the comments by County officials that Dennison and his department were "nit-picking" and "not using common sense" in the enforcement of the Code; (v) and finally, the fact that the County vigorously fought and

rejected Dennison's efforts to seek reinstatement to his job in the grievance proceeding even though the record showed that he was an excellent building official (such reinstatement would have included a declaration that the probation and reevaluation were null and void and without effect).

The Fourth Circuit, in its Opinion, (at page 7) stated that,

> "In its brief, the County argues that Dennison failed to identify any speech that was the basis for his discharge. When the County asked Dennison in his deposition to specify the particular "speech" for which he was fired, Dennison could not do so, and when pressed, was told by his lawyer not to answer the question".

These representations, which were <u>all</u> made by the County in its Appeals Court Brief, and were apparently relied on by that Court, are false. As noted above,

in his deposition, separate from the general messages to back off in the strict enforcement of the VUSBC, Dennison identified the GE incident, the two matters involving the builders' meeting of October, 1985, the Wilson incident and the "suggestion lists" incident, all as "protected speech" which were motivating factors in his discharge. (App. 80 - 92). The representation in Defendants' brief that Dennison's lawyer told him "when pressed" not to answer the recited question is also false. The only time Dennison was directed not to answer was when a pure legal question ("those are the ones on which you are basing your lawsuit?") (App. 88) was asked of Dennison. (Defendants, of course, never sought an order from the Trial Court directing Dennison to answer

this question which indicates they apparently did agree that such was an impermissible question.) Finally, it should be noted, that Defendants' own Counsel acknowledged that Dennison did specify "protected speech" which he (Dennison) claimed was a motivating factor in his discharge when Counsel said: "You've told us about three instances, (GE and the two incidents involving the October 25, 1985 builders meeting) . . . is there any other statement or incident that you contend led to your involuntary resignation?". After this question was asked, Dennison then identified the "suggestion lists" incident. (App. 90 - 92).

How Defendants could represent in their Appeals Court Brief that Dennison, in his deposition, failed to identify

any speech he claimed was protected by the First Amendment which was a motivating factor in his discharge is absolutely beyond us. What these misrepresentations by Defendants show is the extreme to which they believe they must go in order to prevail on their summary judgment motion.

The Court of Appeals also incorrectly concluded that "in response to interrogatories, Dennison's lawyer only alleged that Dennison was discharged for his strict enforcement of the Building Code". As noted above, the "specific instances" were incorporated in that response by a reference to the depositions that had been previously taken in the cause, which would include the deposition that was taken on July 24, 1989 (seven days before the interro-

gatory response was mailed). We saw no reason to repeat the specific details of the same matters which had been identified by Dennison in his deposition, taken seven days before the preparation and mailing of the interrogatory responses.

The Fourth Circuit also states in its Opinion that "Dennison repeats this position in his Reply Brief and to date he has never specified any particular speech for which he was punished". This statement by the Court of Appeals is also incorrect. At page 9 in his Reply Brief, Dennison identified, in connection with the "messages and urgings" that he had received (and failed to follow) to back off in the strict enforcement of the VUSBC, the March,

1986 "suggestion lists" incident and the "Jim Wilson incident".

The Court of appeals also says (at page 9 of its Opinion) that "Dennison could not identify any specific conduct by a supervisor which resulted in an unsafe or unlawful enforcement of the Building Code". This statement ignores the designation of the GE incident by Dennison. (App. 75). In connection with any other "unsafe or unlawful enforcement" we would only remind this Court that Dennison refused all other directives or suggestions, both general and specific, to back off in the strict but proper enforcement of the law. Accordingly, there would not be any other instances of "unsafe or unlawful enforcement" beyond the GE incident. (Dennison, in his July 24, 1989

deposition, also stated under oath that the County's unhappiness with his "strict but proper enforcement of the VUSBC" was a motivating factor in his "constructive discharge". (App. 92 - 94). It was because he failed to follow these "messages and urgings" that he was constructively discharged.

The Fourth Circuit also stated that "Dennison never complained to his supervisor that the office policies regarding the Building Code were unsafe". The complete statement of the record on this issue would be that Defendants' Counsel never asked Dennison whether he ever complained to his supervisor about these matters. We believe we know why such a question was not asked of Mr. Dennison by Defendants' lawyers. Of course, in a summary

judgment context, this type of detail is not required. (The statement by Watkins to Dennison that "you were right, all this was done to either control you or to get rid of you" implies that these types of statements were made to Mr. Watkins by Dennison.)

In ultimately holding for the Defendants, the Court of Appeals characterized the dispute between Dennison and the Defendants as a "personal grievance about working conditions". This assessment by the Fourth Circuit completely ignores the sworn testimony and affidavits of Mr. Dennison that his "speech" in "strictly but properly enforcing the VUSBC" was a motivating factor in his constructive discharge. In the context of a summary judgment motion these sworn

statements by the non-moving party are controlling. Perry, supra.

We do, of course, agree, as this Court has repeated on different occasions, that the question of whether an employee's "speech" addresses a matter of public concern is a question of law. In the consideration of such matter, such question must be determined by the "content, form and context" of a given statement as revealed by the whole record. In this case, the "speech" that is alleged to have been the motivating factor in Dennison's wrongful discharge included (i) his statements and conduct in strictly enforcing the VUSBC, (ii) his statements to General Electric advising them that they must be in compliance with the VUSBC, (iii) his statements to John Riley in refusing to

follow the "suggestion lists" directive, (iv) his statements to Kenneth Stiles in refusing to back off the strict enforcement of the Building Code in the Wilson incident, (v) his statements to Riley that he wanted to publish in the newspaper a response to the "complaints" about the building department alleging too-strict enforcement of the law and (vi) his statement at the October 25, 1985 builders meeting regarding Chappell's "attitude" and its relation to the strict but proper enforcement of the Building Code (would Chappell's "attitude" be perceived as changing if he enforced the Building Code in a less strict manner?). Clearly, the very language of this "speech" indicates that such is a matter of "public concern". The clear meaning and intent of such

speech is not, in any way, altered or varied by the "form or context" in which it is given. Simply stated, there are instances (and this case is one of them) where the plain meaning of the "speech" itself clearly and absolutely establishes that such "speech" is about a matter of "public concern". For example, in Givhan, supra, this Court held that statements that were critical of school desegregation efforts were protected by the First Amendment.

Undeniably, the VUSBC sets forth a "minimum standard" to be followed in the construction of buildings and is meant to protect both the lives and property interests of the citizens of the state. There can be no doubt that the "public interest" is inextrictably involved in all "speech" which relates to the strict

but proper enforcement of the Building Code.

The issue in this case is whether the First Amendment protects a government employee who is wrongfully discharged[2] because of his "speech" in carrying out his legal responsibilities in the enforcement of the law despite "messages and urgings" from his supervisors to back off in such strict enforcement. We believe the answer to this question is very evident and goes to the very foundation of the operation of a government office.

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[2]In this Petition we have not detailed the facts and law which support the conclusion that Dennison was "constructively discharged" from his position as Building Official. This issue is not before this Court.

POINT II

Dennison's Fourteenth Amendment due process rights were violated in that he was given no "notice and opportunity to respond" prior to his termination and further, in connection with the post-termination procedure, that there was no provision for an "impartial" tryer of fact.

There is no dispute between the parties in this case that Dennison, as a non-probationary employee, has a property interest in continued employment which is protected by the Fourteenth Amendment of the U. S. Constitution. The issue is whether or not Dennison was provided with "due process" in both the pretermination and post-termination procedures. It is Dennison's contention that he was not.

This Court, in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S.Ct. 1487, 1495 (1985) clearly

stated that a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story" prior to his termination. In this case, Dennison has stated, under oath, that when he arrived at Riley's office shortly after 4:00 P.M. on September 30, 1986, he was advised that he was then being immediately placed on probation. (App. 73). In fact, as developed in the grievance proceeding, the "revised evaluation" was actually completed, in full, before Dennison arrived at Riley's office at 4:00 P.M. Such written reevaluation included the statement, in Riley's own handwriting, that Dennison was being placed "on probation for six months

effective 9/30/86".

Not only does Dennison's sworn testimony support the position that he was not given proper notice, nor an opportunity to respond, but also the County's own evidence clearly established that the revised evaluation and probation were completed before Dennison arrived at Riley's office at 4:00 P.M. and that Dennison was simply advised of that fact immediately upon his arrival.

In connection with the post-termination due process requirements, the Fourth Circuit (at page 4) in its Opinion, seemed to rely on the fact that Virginia Code §2.1-114.5:1(D)(4) provided for an impartial "fact-finding panel" in that each side chooses one panel member and the third is selected by the

first two. In the Frederick County Manual, pursuant to §12.3 (Step IV), it is provided that from a panel of five each side chooses one and the third is selected (from the original panel) by those two members. However, and most significantly, the original panel of five is chosen solely and exclusively by the County. This procedure, we submit, violates the fundamental requirement that any fact-finder be "impartial". Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927).

POINT III

The Federal Trial Court should not have applied any preclusive effect to

the decision by the Frederick County Circuit Court that Dennison's claim was "non-grievable" because Virginia would not have applied that rule, and furthermore, and even more fundamentally, because Dennison did not have a "full and fair opportunity" to litigate that issue in the State Court because, as a matter of law, there was no right to seek an appeal or review of the State Court decision.

The Federal Trial Court, as noted above, dismissed Dennison's §1983 claim on the sole basis of a res judicata plea that was made just shortly before the scheduled start of the trial. That dismissal was then appealed to the Fourth Circuit. The Court of Appeals, while expressing strong reservations about the correctness of the Trial Court's decision, did not expressly overrule same since the dismissal of the case was upheld on other grounds. In the event this Court, at this time, may want to decide this issue as well, and

so that there can be no claim that this error in the Trial Court has been waived by Petitioner, Dennison assigns this ruling by the Trial Court as error to this Court.

In Allen v. McCurry, 449 U.S. 90, 96, 101 S.Ct. 411, 415 (1980) this Court made it clear that the preclusive rules of the forum state "cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case". In this case, the first and only judicial decision of non-grievability was made by the Frederick County Circuit Court. As provided in §12.2 of the Manual, and in §2.1-114.5:1(E) of the Code of Virginia,

the decision of the State Court Judge[3] was final, and not appealable.

In §28(1) of the Restatement (Second) of Judgments, it is provided that relitigation of the issue in a subsequent action between the parties is not precluded when the "party against whom preclusion is sought could not, as

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[3]The State Court Judge reviewed the decision on grievability by Riley, the Frederick County Administrator. Under §12.2 of the "Manual", the Frederick County Administrator makes the "grievability" decision. Riley, before he rendered such decision, had previously selected James Longerbeam as his "surrogate administrator" for the purpose of taking evidence and making a recommendation to him on such issue. Evidence was then heard before Longerbeam on eleven different days (not eleven days as Respondents like to say). (The entire transcript from such proceeding was 2,269 pages.) Longerbeam, who was selected solely by Riley, recommended to Riley that he deny Dennison's grievability claim. Riley, pursuant to the authority that was vested solely in him, did then deny Dennison's claim. Dennison objected to such procedure.

a matter of law, have obtained review of the judgment in the initial action". This Rule, in a criminal case, was cited with approval by this Court in Standefer v. United States, 447 U.S. 10, 23, 100 S.Ct. 1999, 2007 (1980). Additionally, such rule set forth in §28(1) of the Restatement has been adopted, or cited with approval, in the following decisions from various United States Courts of Appeals, and other courts, throughout the country: Luben Industries , Inc. v. United States, 707 F.2d 1037 (9th Cir., 1983); Southern Union Co. v. F.E.R.C., 857 F.2d 812 (D. C. Cir., 1988); John F. Edwards v. Boeing Vertol Company, 750 F.2d 13 (3rd Cir., 1984); Hussein v. Oshkosh Motor Truck Co., 816 F.2d 356 (7th Cir. 1987); Aetna Cas. & Sur. Co. v. Fairchild, 620 F.Supp. 1245 (D.C.

Idaho 1985); Imperial Outfitters To Large Men, Inc. v. Genesco, Inc., 497 N.E.2d 703 (N.Y. 1986); Anderson-Cottonwood Disposal Service v. Workers' Compensation Appeals Board, 135 Cal.App.3d 326 (1982); Looney v. City of Wilmington, 723 F.Supp. 1025, (D.Del. 1989); and George v. Iskon of California, 262 Cal. Rptr. 215 (Cal. App. 1989).

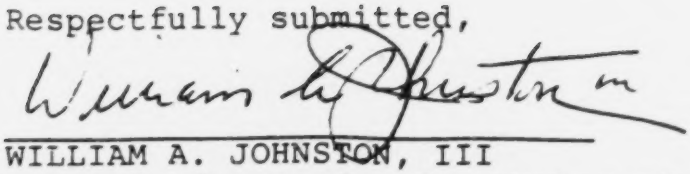
Simply stated, one has not had a "full and fair" opportunity to litigate an issue, and preclusive effect should not apply to any decision, unless the losing party had the right to seek a review of the judgment to which preclusive effect is to be applied. Dennison, very clearly, did not have that right in connection with the State Court action.

CONCLUSION

The holding by the United States Court of Appeals for the Fourth Circuit that (i) Dennison's speech which was alleged to be a motivating factor in his discharge did not involve a matter of public concern and (ii) that the due process requirements were met, so far departs from the accepted and usual course of judical proceedings, and conflicts with the applicable decisions of this Court as to require the Court to exercise its Power of Supervision under Rule 10.1(a) and (c) of the Supreme Court Rules. Further, if this Court decides to hear this question at this time, the decision by the District Court to apply any preclusive effect to the State Court judgment is in conflict with the decisions of other United States

Courts of Appeal on the same subject, and is in conflict with decisions of this Court, compelling the Court to exercise its Power of Supervision under Rule 10.1. The Petition for the Writ of Certiorari should be granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 90-1723

JOHN W. DENNISON,

Plaintiff - Appellant

versus

COUNTY OF FREDERICK, VIRGINIA; KENNETH Y. STILES, individually and in his capacity as Chairman of the Frederick County Board of Supervisors; JOHN R. RILEY, individually and in his capacity as County Administrator of Frederick County, Virginia,

Defendants - Appellees

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. James H. Michael, Jr., District Judge (CA-88-231-H)

Argued: October 30, 1990

Decided: December 19, 1990

Before CHAPMAN and WILKINS, Circuit Judges, and WARD, Senior United States District Judge for the Middle District

of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Chapman wrote the opinion, in which Judge Wilkins and Senior Judge Ward concurred.

ARGUED: Thomas A. Schultz, Jr., HARRISON & JOHNSTON, Winchester, Virginia, for Appellant. Scott Sanford Cairns, MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia, for Appellees. ON BRIEF: William E. Twomey, Jr., MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia, for Appellees.

CHAPMAN, Circuit Judge:

Plaintiff-appellant John Dennison ("Dennison") sued defendant-appellee County of Frederick (the "County") under 42 U.S.C. §1983 (1988), alleging constructive discharge in violation of Dennison's first and fourteenth amendment rights. The district court granted the County's motion for summary judgment

on the basis of collateral estoppel. Although we question the appropriateness of the district court's collateral estoppel ruling, we affirm on alternate grounds raised in this appeal.

I.

Dennison, originally employed by the County in 1977 as a building inspector, was a Building Official for the County from 1981 to 1986. As Building Official, Dennison was responsible for enforcing the Virginia statewide building code. Dennison claims that he was constructively discharged as a result of a series of conflicts he had with the Chairman of the Board of Supervisors Kenneth Stiles ("Stiles") and County Administrator John Riley ("Riley"). Dennison contends that both men "urged" him to relax his strict enforcement of

the building code by questioning his judgment and by limiting his authority. Specifically, Dennison claims that Riley required him to substantiate his building code decisions by going out to the job sites. Further, Dennison's department was reorganized so that he could "no longer directly tell the secretaries in the department what to do, but instead had to go through a 'floor coordinator' who was not a member of his department." After Dennison resigned, however, the reorganization plans were abandoned. Finally, Dennison claims that every complaint filed against him was determined to be unfounded.

On September 30, 1986, Riley met with Dennison for a unscheduled performance review, and Riley told Dennison that he needed to make certain

improvements in his performance before his next formal evaluation. At this time, Dennison was told that his salary, benefits and working conditions would not be affected, but that he would be placed on probation for six months. Dennison responded by orally resigning. After consulting with an attorney, Dennison submitted his written resignation ten days later. Approximately a month later, Dennison filed a grievance with the County Administrator alleging that his resignation had been involuntary.

As an employee of the County, Dennison was subject to the Manual for the Employees of the County of Frederick, Virginia (the "Manual"). The Manual outlines the rights and obligations of County employees, and in

particular establishes a grievance procedure whereby employees can obtain review of allegedly unjust employment decisions made by the County.

Section 12.1(A) of the Manual sets out the complaints or disputes relating to employment that are grievable, specifically including "(i) disciplinary actions, including dismissals (whether resulting from formal discipline or unsatisfactory job performance or an involuntary resignation)." The County Administrator determines whether the alleged wrongful conduct is grievable under this section of the manual. If the County Administrator determines that the complaint is grievable, the complaint proceeds to the final step in the grievance process which is a full panel hearing. The panel comprises "one

member appointed by the grievant, one member appointed by the agency head and a third member selected by the first two." Va. Code § 2.1-114.5:1(D)(4).

If the County Administrator determines that the alleged wrongful conduct is not grievable, the employee may appeal to the State Circuit Court for a de novo hearing on the issue of grievability. Va. Code § 2.1-114.5:1(E). If the Circuit Court reverses the County Administrator's decision, the employee receives a full panel hearing. If the Circuit Court affirms the prior decision, however, the complaint is dismissed without a panel hearing. In either case, the Circuit Court's decision is final and not appealable. Id.

Since the County Administrator, John Riley, was a participant in the

events leading up to Dennison's resignation, he appointed a third party, James Longerbeam, a member of the County's Employee Relations Committee, to conduct an investigation and render a decision on the grievability issue. After eleven days of hearing, Longerbeam issued a written decision which concluded that Dennison was not forced to resign, and therefore, Dennison's claim was not grievable. On March 2, 1988, Riley issued a determination adopting Longerbeam's findings. On March 7, 1988, Dennison appealed Riley's decision to the Circuit Court for the County of Frederick.

On November 18, 1989, Virginia Circuit Judge James L. Berry issued a final order specifically finding that Dennison had not established a

> probability that the County intended to cause his resignation, or that the circumstances of his employment were intolerable. Therefore Mr. Dennison has not established the elements of constructive discharge or involuntary resignation.

This, the court found that his resignation was not grievable and dismissed the case.

On September 29, 1988, over a year before the state court case was dismissed, Dennison filed this case in federal court. Although the County filed a motion for summary judgment, the district court delayed its ruling pending final order in the state action. After the state proceeding established that Dennison was not involuntarily dismissed, the district court found that collateral estoppel barred re-litigation of the involuntary dismissal issue, and

granted summary judgment to the County, because involuntariness of the discharge was an essential element to Dennison's 1983 claim.

II.

Although the County briefed several issues in its motion for summary judgment, the district court granted the County's motion solely on the basis of collateral estoppel. We are concerned that the decision of the state court may not have been the type of final decision required to support collateral estoppel and the district court may have misapplied this doctrine. We will bypass this issue and leave it for another day, because we may affirm a grant of summary judgment on any ground raised by the parties in the district court. See Sine v. Local No. 992, Int'l Bhd. of

Teamsters, 730 F.2d 964, 966 (4th Cir. 1984); accord 10 C. Wright & A. Miller, Federal Practice & Procedure § 2716 (1983). In this case, we find there is an alternate basis for summary judgment and we affirm because appellant has not shown a violation of a constitutionally protected right.

III.

To assert a claim under 42 U.S.C. § 1983, a plaintiff must establish a deprivation of a constitutionally protected right under the color of state law. In this case, Dennison claims a violation of his first amendment right to freedom of speech, and his fourteenth amendment right to due process of law.

A.

A state or division of a state may not discharge an employee for a reason

that infringes that employee's constitutionally protected right to freedom of speech. Perry v. Sindermann, 408 U.S. 593, 597 (1972). To prove that a discharge violates this constitutional protection, an employee must identify the constitutionally protected speech that caused the discharge. Connick v. Myers, 461 U.S. 138, 146 (1983); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284-85 (1977); Jurgensen v. Fairfax County, 745 F.2d 868, 881 (4th Cir. 1984). Inherent in this requirement is a two-part test: first, that speech or at least expressive conduct be involved and, second, that the speech be protected under the first amendment. We hold that Dennison has failed to satisfy either of these requirements. Therefore, even if there

was a discharge, it did not violate Dennison's first amendment right of freedom of speech.

In its brief, the County argues that Dennison failed to identify any speech that was the basis for his discharge. When the County asked Dennison in his deposition to specify the particular "speech" for which he was fired, Dennison could not do so, and when pressed, was told by his lawyer not to answer the question. In response to interrogatories, Dennison's lawyer only alleged that Dennison was discharged for his strict enforcement of the building code. Dennison repeats this position in his reply brief, and to date he has never specified any particular speech for which he was punished, but he has relied on general allegations that he

was being punished for a general course of conduct.

Although "speech" does not have to be spoken to be protected under the first amendment, see, e.g., Texas v. Johnson, _____ U.S. _____, 109 S. Ct. 2533 (1989) (flag burning is protected "speech" under the first amendment), the Supreme Court has repeatedly rejected "the view that an apparent limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968). At most, the present case involves a dispute over a general course of conduct, not the expression of any idea or opinion. Dennison never evinced an "intent to convey a particularized message . . . ."

Spence v. Washington, 418 U.S. 405, 410-11 (1974). Since Dennison cannot identify any particular speech, symbolic or otherwise, for which he was punished, we hold that, as a matter of law, his first amendment right to freedom of speech could not have been violated.

Furthermore, even if Dennison's overall course of conduct could be construed as "speech" we hold that his speech would not be protected under the first amendment. Although the Supreme Court has not fashioned a rigid test of what speech is protected, the Court has historically balanced "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its

employees." Rankin v. McPherson, 483 U.S. 378, 384 (1987) (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); accord Connick, 461 U.S. at 140; Mt. Healthy, 429 U.S. at 284. Accordingly, this court has adopted a two-part test to evaluate whether the speech is constitutionally protected: "(1) whether the speech qualified as a matter of public concern and (2) what effect the speech has on the efficiency, discipline and proper administration of the workplace." Dwyer v. Smith, 867 F.2d 184, 193 (4th Cir. 1989).

Since Dennison has failed to identify any particular speech, it is admittedly difficult to determine whether his speech is protected. Nevertheless, accepting Dennison's allegation that his general course of

code enforcement was speech for which he was fired, we hold that it was not protected. We first question whether Dennison's course of conduct qualifies as a matter of public concern. Although the safety of public buildings could be considered important to public welfare, Dennison never complained to his supervisor that the office policies regarding the building code were unsafe. Moreover, Dennison could not identify any specific conduct by his supervisor which resulted in an unsafe or unlawful enforcement of the building code. At most, Dennison complains of "urgings" by his supervisor for a less strict enforcement of the code, as manifested by requiring Dennison to visit the job sites to confirm his decisions and by

reorganizing the secretarial pool working for Dennison.

The Supreme Court has repeatedly recognized that the category of "matters of public concern" does not involve every bureaucratic complaint:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark--and certainly every criticism directed at a public official--would plant the seed of a constitutional case . . . . The First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Connick, 461 U.S. at 149. Accordingly, personal grievances about working conditions do not qualify as matters of public concern. See Lewis v. Blackburn, 759 F.2d 1171 (4th Cir.) (en banc) (magistrate who was not reappointed because she "protested" her workload did

not state a constitutional claim), cert. denied, 474 U.S. 902 (1985). Although Dennison's allegations appear to be of public interest, when they are considered in the context of what actually occurred with the office reorganization and his probation, they are "more properly viewed as essentially a 'private' matter between employer and employee." Berger v. Battaglia, 779 F.2d 992, 999 (4th Cir. 1985), cert. denied, 476 U.S. 1159 (1986).

Since we hold that Dennison's speech did not involve a matter of public concern, the speech cannot be protected under the first amendment. Therefore, we do not address the second part of the test involving the effect of the speech on the administration of the workplace.

B.

Dennison also argues that since he was constructively discharged, his fourteenth amendment rights were violated as well. To establish such a claim, Dennison must prove that he was in fact constructively discharged and that the County failed to provide adequate procedural due process as required by the fourteenth amendment. The County makes a strong case against Dennison's claim that he was constructively discharged, but we need not resolve this factual dispute when it is clear that the County's procedures more that satisfy the due process requirements of the fourteenth amendment.

Dennison alleges a lack of due process in the initial review meeting with his supervisor when he was advised

of his probation. At this meeting, however, Dennison resigned without responding to the charges about his poor performance. Assuming that Dennison was constructively discharged, this meeting operated as a pretermination hearing. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) (pretermination hearing need not be elaborate and must simply provide the employee with notice of the charges against him and an opportunity to respond). Accordingly this meeting satisfied the initial requirements of due process prior to discharge. (See Buschi v. Kirven, F.2d 1240 (4th Cir. 1985) (telephone call offering employee opportunity to discuss discharge satisfied pre-termination hearing

requirements and, therefore, complied with due process).

This court has held that the grievance procedure established in the Virginia Code provides sufficient post deprivation remedies. See Detweiler v. Virginia Dept. of Rehabilitative Servs., 705 F.2d 557 (4th Cir. 1983). Dennison spurned this procedure in favor of resignation. Even though he had resigned, Dennison was still permitted to invoke the grievance procedure, and he received an eleven-day administrative hearing in which he was represented by counsel and could call witnesses as well as cross-examine adverse witnesses. Accordingly, we hold that even assuming that Dennison was constructively discharged, he received all of the

procedural due process to which he was entitled under the fourteenth amendment.

IV.

For the above reasons, the district court's decision to grant summary judgment to the County is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED: January 25, 1991

No. 90-1723

JOHN DENNISON,

Plaintiff - Appellant

v.

COUNTY OF FREDERICK, VIRGINIA; KENNETH Y. STILES, individually and in his capacity as Chairman of the Frederick County Board of Supervisors; JOHN R. RILEY, individually and in his capacity as County Administrator of Frederick County, Virginia

Defendants - Appellees

O R D E R

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Chapman with the concurrence of Judge Wilkins and Judge Ward, Senior United States District Judge sitting by designation.

For the Court,

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JOHN W. DENNISON,	)	CIVIL ACTION NO.
	)	88-0231-H
Plaintiff	)	
v.	)	MEMORANDUM
	)	OPINION
COUNTY OF FREDERICK, et al.,	)	JUDGE JAMES H. MICHAEL, JR.
Defendants	)	

Plaintiff in this 42 U.S.C. § 1983 action was the Building Official for Frederick County, Virginia, until his resignation on September 30, 1986. He alleges that his resignation was the result of an involuntary discharge in violation of his First and Fourteenth Amendment rights. The defendants have moved for summary judgment on the merits, and on res judicata grounds. The issues have been briefed, oral argument was heard on November 14, 1989, and further briefs were subsequently

received. The case is now ripe for decision.

I

Plaintiff John W. Dennison was originally employed by the defendant County of Frederick (the "County") in 1977 as a building inspector. In 1981 he was appointed to the position of Building Official, which title he held until his departure in September of 1986. As an employee of the County, Dennison was subject to the Manual for the Employees of the County of Frederick, Virginia (the "Manual"). The Manual outlines the rights and obligations of County employees, and in particular establishes a grievance procedure whereby employees can obtain review of allegedly unjust employment

decisions made by the County.[1]

Section 12.1(A) of the Manual sets out those complaints or disputes relating to employment that are grievable; these include "(i) disciplinary actions, including dismissals (whether resulting from formal discipline or unsatisfactory job performance or an involuntary resignation)." Unless a dismissal falls within § 12.1(A)(i) it is not grievable. The decision on grievability rests with the County Administrator. Manual § 12.2. In the event an employee disagrees with the County Administrator's decision, he may appeal to the State Circuit Court for a hearing de novo on

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[1]The establishment of a grievance procedure is mandated by Va. Code §15.1-7.1. In addition, §15.1-7.1 requires that county grievance procedures conform with the state procedure set out in Va. Code §2.1-114.5:1.

the issue of grievability. Va. Code § 2.1-114.5:1(E). The decision of the Circuit Court as to grievability is final and not appealable. Id. Dennison alleges that his resignation was involuntary and therefore grievable under § 12.1(A)(i) of the Manual.

Since the County Administrator, John Riley, was a participant in the events leading up to Dennison's resignation, he appointed a third party, James Longerbeam, a member of the County's Employee Relations Committee to conduct an investigation and render a decision on the grievability issue. Hearings were conducted before Longerbeam on

eleven days.[2] On February 25, 1988, Longerbeam issued a written decision which concluded

> [T]he facts and circumstances surrounding the resignation of . . . Dennison from his position of Building Official of Frederick County do not constitute involuntary resignation and therefore . . . Dennison does not have . . . standing to have submitted a grievance.

On March 2, 1988, Riley issued a determination adopting Longerbeam's findings. On March 7, 1988, Dennison appealed Riley's decision to the Circuit Court for the County of Frederick under Va.Code § 2.1-114.5:1(E). Subsequently, on September 29, 1988, Dennison filed the summary judgment, the core of which

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[2]Hearings were held on December 18-19, 1986, January 8-9, 1987, June 30, 1987, July 1-2, 1987, October 19-21, 1987 and November 2, 1987.

was the argument that defendant had failed to show that he was a victim of an involuntary resignation. At the November 14 hearing it was brought to the court's attention that an order was imminent in the state court action; as a result, the court requested additional briefing on the potential res judicata affect of the upcoming state court decision.[3]

On November 28, 1989, Judge Berry issued an Order and a Final Order in Dennison's state case (Dennison v. County of Frederick, No. CL-88000032-00, Circuit Court for the County of Frederick). Judge Berry specifically found that

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[3]By res judicata the court means both issue preclusion and claim preclusion.

> Dennison had not established a probability that the County intended to cause his resignation, or that the circumstances of his employment were intolerable. Therefore Mr. Dennison has not established the elements of constructive discharge or involuntary resignation.

Order, at 2. Thus, the state court found that his resignation was not grievable. Id. In its Final Order the Circuit Court ended the state action and declined to reconsider its prior Order of November 3, 1988, which refused to allow the production of further evidence. By statute, the Circuit Court's decision on the grievability question is final and unreviewable.

The question currently before this court is what preclusive effect, if any, the state court's orders of November 28 have on this court.

II

It is "settled that a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). The rule is no different in actions under 42 U.S.C. § 1983. Id. at 84-85. The state court's decision is res judicata as to issues or claims actually litigated as well as those which could have been litigated. Id. The state court's decision is res judicata as to questions of law as well as issues of fact. United States v. Stauffer Chemical Co., 464 U.S. 165, 170-171 (1984). The question under Migra, then, is what preclusive effect Virginia law gives to

Judge Berry's orders.

Under Virginia law, "a judgment in favor of a party "bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies.'" Brown v. Haley, 233 Va. 210, 215 (1987), quoting Bates v. Devers, 214 Va. 667, 670-671 (1974). "In the subsequent action, the parties to the first action and their privies are precluded from litigating any issue of fact actually litigated and essential to a valid and final personal judgment in the first action." Hozie v. Preston, 493 F. Supp. 42, 44 (W.D. Va. 1980). It is undisputed that identity of the parties is the same between the state action and the present one. Nor does there appear from the record before this

court to be any meritorious challenge to the validity of Judge Berry's orders. Before adressing (sic) the remaining requirements it is useful to determine just what facts are at issue in both the state case and this one.

In order to survive a motion for summary judgment Dennison must show that he was a victim of an involuntary resignation; for if his resignation was voluntary defendants bear no responsibility for effects flowing from it. All other claims in the amended complaint are contingent upon a finding that plaintiff involuntarily resigned; if an involuntary resignation is not shown defendants must prevail. Precisely the same question was at issue in the state court action. In order for Dennison's claim to be grievable he had

to demonstrate that he had involuntarily resigned. Manual, §12.1(A)(i). Thus, while the ultimate question before the state court was whether the claim was grievable, the underlying factual issue was whether an involuntary resignation had been shown.

Involuntary resignation and constructive discharge are equivalent terms. Pittman v. Hattiesburg Municipal Separate School Dist., 644 F.2d. 1071, 1077 (5th Cir. 1981). "A constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job." Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), cert. denied, 475 U.S. 1082 (1986) (citations omitted). To survive summary judgment Dennison must

show two elements: deliberateness of the employer's actions, and intolerability of the working conditions. See Id. A Plaintiff must adduce evidence of the employer's specific intent to force him to resign. Id. Intolerability of the working conditions is judged by an objective standard: a "reasonable person" in the employee's position must have felt compelled to resign. Id.

The state court applied the Bristow standard in reaching its determination of the involuntary resignation question, Order at 2; consequently, the precise issues resolved there are the ones that this court would have to resolve. Since a finding of an involuntary discharge was a prerequisite to a finding of grievability these issues were clearly "essential" to the state court's hold-

ing. See Hozie, 493 F. Supp. at 44. The only remaining question then, in determining whether the state court decision precludes the present action is whether intent and intolerability were "actually litigated" in the Circuit Court proceeding.

The state court considered the transcript of the proceedings before Longerbeam, which total some 2,500 pages and an additional volume of exhibits, as well as argument by counsel. While the court did not receive any new evidence, the decision to receive further evidence is discretionary with the court, Va. Code §2.1-114.5:1(E), and the court's exercise of discretion here certainly seems proper in light of the volume of

material already before it.[4] Even if this court had some doubt -- which it does not -- as to the propriety of the ruling, it is not free to review the decisions of the state courts. District of Columbia Circuit Court of Appeals v. Feldman, 460 U.S. 462, 482 (1963).

A review of the briefs filed by the parties in the state court proceedings shows that deliberate intent of the employer and intolerability of working conditions were squarely before the court and argued by counsel. The court is satisfied that these issues

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[4]The transcript of the final hearing before Judge Berry also indicates that counsel for Dennison represented to the court that he felt that evidence which was before the court was more than adequate.

were actually litigated before the Circuit Court. The decision by the state court not to take additional evidence does not alter this court's analysis.

The requisite conditions of state law having been met, Migra requires this court to give the state court decision preclusive effect here.

III

An essential element of plaintiff's claim having been decided adversely to him in a proceeding before the Circuit Court for the County of Frederick, and that decision being final and unreviewable, that issue is now res judicata. Therefore, summary judgment for the defendants in the present action, as to plaintiff's federal claims, is appropriate. In light of the decision on the

federal questions, the court will dismiss without prejudice the plaintiff's state law claims. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726-727; Reamer v. United States, 459 F.2d 709, 711 (4th Cir. 1972).

An appropriate Order shall this day issue.

ENTERED: JAMES H. MICHAEL, JR.
United States District Court
Judge

December 1, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JOHN W. DENNISON,	)	CIVIL ACTION NO.
	)	88-0231-H
Plaintiff	)	
v.	)	O R D E R
	)	
COUNTY OF FREDERICK, et al.,	)	JUDGE JAMES H. MICHAEL, JR.
Defendants	)	

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

that:

1. Defendants' motion for summary judgment as to plaintiff's federal claims shall be, and it hereby is, granted.

2. Plaintiff's state law claims shall be, and they hereby are, dismissed without prejudice.

3. This case shall be, and it

hereby is, dismissed and stricken from the docket of this court.

The clerk is hereby directed to send a certified copy of this Order, and the accompanying Memorandum Opinion, to all counsel of record.

ENTERED: JAMES H. MICHAEL, JR.
United States District Court Judge

December 1, 1989

FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JOHN W. DENNISON,	)	CIVIL ACTION NO.
	)	88-0231-H
Plaintiff	)	
v.	)	O R D E R
	)	
COUNTY OF FREDERICK, et al.,	)	JUDGE JAMES H. MICHAEL, JR.
Defendants	)	

For the reasons stated in open court it is this day

ADJUDGED AND ORDERED

that the plaintiff's motion for reconsideration of this court's decision of December 1, 1989, shall be, and it hereby is, denied.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: JAMES H. MICHAEL, JR.
United States District
Court Judge

January 12, 1990

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JAMES H.
MICHAEL, JR.
UNITED STATES DISTRICT JUDGE
JANUARY 9, 1990

Pages 31 through 36:

THE COURT: All right, gentlemen of counsel, on the motion for reconsideration tendered by the plaintiff in this matter, the court has reviewed with a good deal of care all of the pleadings in this case ending, of course, with the oral argument which was presented here today.

Basically the court is of opinion that much of what has been said here today in fact is simply a reargument about matters which have been presented in detail in the period leading up to the Opinion of this court on the 1st day of December of 1989.

Now, it is true that a motion for reconsideration has two potential - - has two predicates, either of which justifies reconsideration. One of those predicates is newly discovered information, evidence. I don't think anybody contends that that's the case here. The other predicate is that there has been some change in the law or some misinterpretation of the law. There is no argument that there has been a change in the law that the court is aware of. So it must proceed on the thesis that this court has misconstrued the law.

On that basis, the court has looked again at the case law and begins its review of the matter with Migra v. Warren, where the Supreme Ciourt squarely held that it was requisite on thie court to give to the judgment of

state court, in this case the Circuit Court of theCounty of Frederick, the same preclusive effect which other state courts would give to the judgment of the Circuit Court of the County of Frederick, and the court has found no evidence, no authority for the proposition that the other state courts of the Commonwealth of Virginia would not give preclusive effect to the judgment of the Circuit Court of the County of Frederick.

That is essentially based on the proposition that the statutory pattern which is prescribed here - - and Mr. Schultz is quite right it was prescribed as an effort to ameliorate the rigidity of the doctrine of sovereign immunity as to certain state employees., But with that observation made, it still is a

pattern which has been carefully constructed by the General Assembly and must be construed, of course, strictly because it is in derogation of the sovereign right to immunity.

Now, in the statute itself, it is provided that the decision of, in this case the County Administrator, that entitlement to grievability was not shown was by the language of the statute appealed "to the circuit court." Now, I don't have the citation to the statute immediately before me, but I looked at it or the law clerk read it to me during the recess, that is in every way that this court can construe it an indication that an appellate process flows on the appeal of the decision of the Administrator to the circuit court, and of course, as everyone recognizes the

statute further provides that the decision of the circuit court is not appealable.

Regardless of what may have been said - - what is the case - - Standefer or in the other cases cited by Mr. Schultz, the fact of the matter is that this statute precisely and definitely contemplates an appeal of the decision of the County Administrator, and the action of the circuit court in making the decision becomes the appellate result of that appeal.

Now, it should be noted carefully that as Mr. Cairns pointed out, in Standefer itself on which Mr. Schultz appropriately heavily relies, the court in that case stated in the Footnote 18, that the result that came about in Standefer "does not suggest that the

availability of appellate review is always an essential prediate of estoppel."

But in this case under the very terms of the statute there has been appellate review in the Circuit Court of the County of Frederick. Because that is the case and with the lengthy proceedings before the hearing officer were ample opportunity basically was affcreded to the plaintiff in this case to present appropriate evidence to lead the County Administrator to conclude that grievability was appropriate, it seems to this court that that process coupled with appellate review by the circuit court provides the due process which the constitution both of Virginia and of the United States requires to be afforded to any plaintiff or any party

in a proceeding before this or any other court.

It is also a matter of considerable doubt to this court whether in light of the various circuit court opinions which have been handed down by the circuit courts of the Commonwealth of Virginia, the Supreme Court of Virginia or even the Court of Appeals is likely to adopt in toto the language of the Restatement of Judgments (Second) which has been quoted so often in this argument.

The lower court was called on to decide precisely the question which it did, that is, grievability vel non, but it did not decide that question in a vacuum. It considered the underlying question which had to be considered concerning constructive discharge, and it came to the conclusion that there was

no constructive discharge, and because there was no such discharge, then grievability did not lie.

It could not have been reached under the fact pattern and process in this case - - the Circuit Court of the County of Frederick could not have reached the decision that it was not greivable without deciding as a predicate to that decision that the constructive discharge had not been shown. Certain circuits cited by Mr. Schultz have, in fact, apparently adopted flatly the Restatement of Judgments pronouncement about preclusive effect.

But so far as this court is aware, not one of those cases involved a situation in which the General Assembly or the ligislature of those states had

said this is the appeal process. So that under the statute, going to the Circuit Court of the County of Frederick on the decision of the County Administrator was, in fact, an appellate procedure. If that is the case in any one of the cases cited by Mr. Schultz, this court is not aware.

Under those circumstances, the court must adhere to its decision of the 1st of December od 1989 and consequently will overrule the motion for reconsideration.

MR. SCHULTZ: Judge, we need to duly note our objection.

THE COURT: Oh, surely.

MR. SCHULTZ: And I think probably procedurally it would be better practice to state the grounds for objection on the record.

THE COURT: That's not necessary. I accept the grounds as you already have outlined them in your argument and invite the careful attention of the Court of Appeals to let argument.

MR. SCHULTZ: I appreciate that, Judge. Thank you, sir. My objection then is noted and our bases as argued during the proceeding.

THE COURT: It may be that we will get another Stall opinion. I don't know, but we will see.

MR. SCHULTZ: It may be, Judge.

THE COURT: Is there anything further to be done at this time?

MR. CAIRNS: No, Your Honor.

THE COURT: All right. An Order will follow which willonly recite that for the reasons stated in open court the motion for reconsideration is denied.

Under those circumstances we can adjourn for the day.

The hearing concluded at this time

IN THE CIRCUIT COURT OF THE COUNTY OF FREDERICK

JOHN DENNISON,

Grievant,

vs. Case No. CL-88000032-00

THE COUNTY OF FREDERICK, VIRGINIA,

Employer

ORDER

This matter came before the Court on November 3, 1989 for argument on the grievant's appeal of the County Manager's ruling that his complaint was not grievable. The Court has received evidence and extensive memoranda from both parties.

Based upon the administrative file, the transcript of the hearings held before Mr. Longerbeam, and the argument presented by counsel, the Court finds as follows:

1. The matter before this Court is Mr. Dennison's attempt to grieve his resignation of September 30, 1986. Mr. Dennison contends that his resignation was involuntary.

2. By letter of May 29, 1989, which is considered an order of this Court, the Court rules that it is grievant's burden in this action to present evidence that would establish a probability that his resignation was involuntary, or in other words, that his resignation occurred under circumstances that would constitute a constructive discharge. A grievant alleging constructive discharge must prove two elements: deliberateness of the employer's action and intolerability of the working conditions. See Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th

Cir. 1985), cert. denied, 575 U.S. 1082 (1986).

3. Mr. Dennison has not established a probability that the County intended to cause his resignation, or that the circumstances of his employment were intolerable. Therefore, Mr. Dennison has not established the elements of constructive discharge or involuntary resignation.

4. Mr. Dennison's complaint concerning his resignation does not fall within the categories of complaints that are subject to the County's Grievance Procedure.

Therefore, the Court finds that grievant has failed to present sufficient evidence to establish a probability that his resignation was grievable under the County's Grievance Procedure.

Accordingly, it is ORDERED that the County Manager's determination is AFFIRMED and grievant's appeal and request for a panel hearing is DISMISSED. The Court notes grievant's objections to all adverse determinations. The Clerk shall send a copy of this Order to all counsel of record.

ENTERED: 11/28/89

JAMES L. BERRY
JUDGE, CIRCUIT COURT FOR THE
COUNTY OF FREDERICK, VIRGINIA

SEEN AND OBJECTED TO:

THOMAS A. SCHULTZ, JR., ESQUIRE
Counsel for Grievant

We ask for this:

WILLIAM E. TWOMEY
LAWRENCE R. AMBROGI
Counsel for Employer

CONSTITUTIONAL CITATIONS

Amendment 1:

Religious and political freedom.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment 14:

Section 1. Citizens of the United States.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL STATUTES

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered

to be a statute of the District of Columbia.

§2.1-114.5:1

. . . (D) (4). Qualifying grievances shall advance to the final step which shall provide for a hearing before an impartial panel, such panel to consist of one member appointed by the grievant, one member appointed by the agency head and a third member selected by the first two.

(E). . . . Decisions of the agency head may be appealed to the circuit court having jurisdiction in the locality in which the grievant is employed for a hearing de novo on the issue of whether or not the grievance qualifies for a panel hearing.

. . . The court may affirm the decisions of the agency head or may reverse or modify the decision. The

decision of the court shall be rendered no later than the fifteenth day from the date of the conclusion of the hearing. The decision of the court is final and is not appealable.

VIRGINIA UNIFORM STATEWIDE BUILDING CODE

Section 103.1 General: The building official shall enforce the provisions of the USBC as provided herein, and as interpreted by the State Building Code Technical Review Board in accordance with Section 36-118, Code of Virginia.

Section 113.2 Notice of violation: The building official shall serve a notice of violation on the person responsible for the construction, alternation, extension, repair, removal, demolition or use of a building in violation of the provisions of the USBC, or in violation of plans and specifications approved thereunder, or in violation of a permit or certificate issued under the provisions of the USBC. Such order

shall direct the discontinuance and abatement of the violation.

Section 113.3 Prosecution of violation: If the notice of violation is not complied with promptly, the building official shall request the legal counsel of the jurisdiction to institute the appropriate legal proceedings to restrain, correct or abate such violation or to require the removal or termination of the use of the building in violation of the provisions of the USBC.

7.2 Period of Evaluation

From the date of original appointment or promotion, all employees except temporary workers shall be evaluated at the end of the sixth month of service, at the end of the twelfth month of service and on a six month basis thereafter. An employee shall not be eligible for a pay raise until the performance evaluation form has been completly processed. Department Heads shall be responsible for the timely processing of personnel evaluations within their department to insure that an employee's merit increase is not delayed. Should the department head refuse to conduct the evaluation, the employee may request evaluation by the

Personnel Committee.

7.4 Review with Employee

Each employee shall have the opportunity to review every evaluation made of him. Upon a review of the evaluation, the employee shall note in writing that the evaluation is agreeable or that he requests a review of the evaluation by a higher level of authority.

12.2 Determination of Grievability

If some question should exiat concerning the grievability of a specific problem, and if the question cannot be resolved in the satisfaction of both the employee and his supervisor at the departmental level, the employee may make a request, to the County Administrator, for a ruling of

grievability who shall respond within five days.

In any case, no complaint may be addressed beyond the County Administrator level before grievability has been determined. Only after grievability has been determined shall a grievance be processed through the grievance panel stage. Decisions of the County Administrator may be appealed to the circuit court for a hearing de novo on the issue of grievability as provided for in Virginia Code, Section 2.1-114.5:1(E). The decision of the court is final and is not appealable.

12.3 Grievance Procedure

STEP IV. . . . Within seven (7) work days after the date of the written

request for a panel hearing, the Board of Supervisors will supply the department head with a list of five (5) prospective panel members to hear the grievance, none of whom may have been involved in an earlier phase of the grievance. Three members who will constitute the panel shall be selected from this list - one member shall be chosen by the department head; one member shall be chosen by the grievant; and the remaining member shall be selected by the first two appointees and shall serve as the chairperson.

DEPOSITION OF JOHN W. DENNISON

OF JULY 24, 1989

QUESTIONS BY: Scott Cairns, Co-Counsel for County of Frederick

Pages 32 - 33:

A. Halfway through that meeting...well, at the beginning of it, the builders were complaining about Mr. Chappel's attitude. One builder in particular, and I can't for the life of me remember what his name was, but at that time I commented to Mr. Riley if I could respond to Mr. Chappell's attitude to the builders and he said, no. I felt it was unfair so I responded anyway.

And my response was if Mr. Chappel quite writing correction orders, would

his attitude get better? They wouldn't let that be answered. And they, after that, Mr. Stiles was in the back of the room, he wrote a note, came forward, handed it to Mr. Riley, Mr. Riley handed it to Mr. Harriman and Mr. Harriman came over and told me Mr. Chappel would have to leave the meeting.

* * *

Page 40:

A. The complaint was not only an inspection was being performed, the complaint was that it was required that he install handicap facilities, bathroom, in the building.

* * *

Page 43:

Q. But you have read this Amended Complaint before today, is that correct, Mr. Dennison?

A. Yes.

Q. Do you recall whether there's anything in here that you believe is incorrect?

A. I would have to read it again before I could answer that.

Q. But without reviewing it again, there's nothing that sticks in your mind...

A. No.

Q. ...that you felt was incorrect?

A. No.

* * *

Page 56:

A. When he told me that he was placing me right then, that immediate Monday, on probation and changing my evaluation.

* * *

Pages 83 - 84:

Q. That's all I'm asking you. Now, if you'd look back at Exhibit #1 which is the Amended Complaint. Paragraph 7, again, about three-quarters of the way down the page there's the statement that Defendants did cause you to resign because you had been, and I'm quoting, "properly, but thoroughly, enforcing the Building Code of the State of Virginia within such Frederick County, such enforcement being contrary to the intent of such Kenneth Y. Stiles and/or John R. Riley." Do you see that statement?

A. Yes, sir.

Q. Are you referring to any specific incidents in that statement?

A. I'm referring to the attitude of Mr. Riley and Mr. Stiles displayed that

would suggest that they did not want the Code enforced.

MR. SCHULTZ: And let me again object on the grounds that that calls for, at least in part, a legal conclusion. Answer as best you can.

* * *

Page 85:

Q. I'll ask your attorney's questions, first, Mr. Dennison. Did Mr. Stiles or Mr. Riley ever tell you not to enforce the Building Code of the State of Virginia?

A. In one instance Mr. Riley directed me in writing not to enforce the Code of the State of Virginia.

Q. Is that with respect to the GE plant and the opinion from Mr. Ambrogi?

A. Yes, it is.

* * *

Page 86:

Q. What was that instance?

A. That was the on Jim Wilson's structure located on Lenore Drive in Frederick County, Virginia.

Q. What did Mr. Stiles say to you?

A. You want me to go through what happened or do you want me to just say what he said to me?

Q. What did Mr. Stiles say to you?

A. Mr. Stiles...Mr. Stiles asked me if there was...as Building Official was there any relief I could give him or could I waive it or could I just forget about it.

Q. And what did you respond?

A. I responded, no.

* * *

Pages 87 - 89:

Q. You keep saying "not as a directive." What do you mean by that?

A. There's other ways to direct people to do things without being direct or me telling you, don't do that, do not enforce that.

Q. Now...

A. I think their constant going out on complaints, no matter how many of them they investigated, they never found any of them to be wrong. Violations written by the inspector or by myself or anyone from the department, they were always found that they were in violation of the Code.

And yet, periodically, and from the time that Mr. Stiles became Chairman of the Board, it increased dramatically

how many times...how many complaints was registered, how many times that Mr. Riley, Mr. Harriman, Mr. Orndorff went out and looked at these complaints.

In fact, there were so...they did it so much that they did it without me even being there. They would go out and investigate them.

Q. And in each instance they found that your interpretation of the Code was correct.

A. Yes. But by them continuing to go out in that fashion without informing the Building Official or supporting the Building Official in his decision, they elected to show force in the field. And no matter how many times that they concluded that the violations were...needed to be taken care of, to my knowledge, they never let the person

that was complaining know.

They just never materialized anything. It was just next week there's going to be another one and next week there's going to be another one. And you could count on it.

Q. But in each incident that they investigated, they supported your interpretation of the Code and the builder was required to comply with your notice, is that correct?

A. If you can say support by making comments that the builder can hear, that I think that that's nit-picking, I don't think, you know, that you could use common sense instead of the Code book. I don't consider that supportive.

Q.They never overrode your decision with respect to a noticed Code violation, did they?

A. No, except as to GE.

* * *

Pages 92 - 100:

Q. Turning back to Exhibit #1, turn to Page 4. At the very top of the page there's a reference to violation of your Constitutional rights including his First Amendment rights.

Do you contend that there was any specific speech that led to your forced resignation as alleged in your Complaint?

MR. SCHULTZ: I'm going to object again on the grounds that I think that again, requires some kind of legal interpretation. When you say "speech," I think it's a problem I have, counsel, being the point of what that

word means from a legal standpoint.

MR. CAIRNS: I apologize.

Q. Do you contend that you ever made any public statements that led to your forced resignation?

MR. SCHULTZ: I think he's answered...I'm going to object to that in the sense that it's been asked and answered. I think he's stated that his conduct in enforcing the Building Code was the motivation behind the creation of the circumstances, particularly the placing on probation, that caused him to resign.

I think he's already answered that without having to make a legal interpretation of what you mean by the word "speech." So that's been asked and answered.

Q. Well, is that the only action

that you believe is protected by the First Amendment that led to your resignation?

MR. SCHULTZ: Now, wait, now. Now, obviously that...that's a pure legal conclusion.

MR. CAIRNS: You have alleged a First Amendment violation. We have a right to know what it is that you believe is the protected speech.

If you think it's just a general enforcement of the Building Code...

MR. SCHULTZ: It is.

MR. CAIRNS: ... that's what I'm asking.

MR. SCHULTZ: It is.

MR. CAIRNS: There's no specific speech on a specific date that you're talking about, is that right? I'll abandon this area of inquiry...

MR. SCHULTZ: I mean, he told you about GE, he has told you specifically about the, I think it was Wilson where they said thus and so.

MR. TWOMEY: Tas, would you like us to take your deposition?

MR. CAIRNS: Well, that's fine. Is this Mr. Dennison's testimony here that you're giving us?

MR. SCHULTZ: You're asking for a legal conclusion, Scott.

MR. CAIRNS: No, I'm not. I'm asking for what the...I'm entitled to know what it is that he's basing his complaint on.

That's like saying that you don't have to tell in a defamation suit what speech is involved.

MR. SCHULTZ: Well, the way you're asking it, it's going to

cause a legal conclusion. You can ask him about any knowledge or information concerning their attitude about the enforcement of the Code, for instance, or examples of where they have, in fact, told him not to enforce it which I think you've asked him the second, where they've asked him not to enforce it.

You haven't asked him any other questions where they indicated in any way, in a general way, that they didn't want the Code enforced.

Now, you haven't asked him that and that would, obviously, be an appropriate basis to make a claim, that the motivation behind the intolerable situation that was created was his enforcement of the Building Code.

MR. CAIRNS: You've noted your objection. I'm going to ask the question that I would like to ask.

Q. Are there any statements that you contend that you made in public that caused the County to seek your involuntary resignation?

MR. SCHULTZ: Same objection as before. You're calling for a legal judgment but answer it as best you can, if you can understand what he means.

A. Well, I have a problem with the way you're asking me, too, because your question would single out one particular instance.

Q. That's exactly what I want. I want you to tell me every single incident, on the date and who you were

speaking to, that you contend caused this involuntary termination.

A. Okay. If you're asking me for dates and particular incidents, I can comment on it. But if you're asking me just to comment rather on one issue, I feel that my personal rights were violated on October 25th when Mr. Riley, Mr. Stiles and Mr. Orndorff would not let me speak at the builders meeting. Directed me not to speak.

Q. Is there any other incident, specific date?

A. I think it was violated when Mr. Riley would not let me put anything into the newspaper to answer back to the builders verbally or written.

Q. When did that occur?

A. That occurred right after I answered to the Public Works Committee

in October. I had to go down and answer to every one of the complaints that was on that tape or every one that the builders made.

Q. Would that have been shortly after October 25th, 1985?

A. Yes, it would.

Q. Within a week afterwards?

A. Yes, somewhere in that period of time.

Q. Is there any other occasion that you contend violated your free speech rights?

MR. SCHULTZ: Same objection as before.

A. I feel when Mr. Riley directed me that I could not inform GE verbally or in writing that they were in violation of the Code was a violation.

Q. Are there any other incidents?

MR. SCHULTZ: Same objection.

A. I'm sure there was, but I can't set here right now...those are the ones that I can...are most vivid to me.

Q. Those are the ones on which you're basing your lawsuit?

MR. SCHULTZ: Now, I'm going to object to that and direct him not to answer that because that is a pure legal conclusion on his part, Mr. Cairns, and that is the only purpose of that, sir, and he's not a lawyer. I direct him not to answer that.

You can ask him in terms of what he remembers about that and he has given you as best he can. There are other things that, quite frankly, we're going to rely on that he may not understand from a legal standpoint and that's the

problem with the way you ask the question.

Maybe if you get into more specific questions, such as I was suggesting to you, I would think he'd know about that.

But I'm directing him not to answer that question because that's a pure legal question, sir.

MR. CAIRNS: I'm not sure I...could you read back the question that he's instructed him not to answer.

(WHEREUPON, the pending question was played back by the court reporter.)

Q. You've told us about three instances, one involving GE where you were told not to inform GE of the violation, one where you were told not to put a statement in the newspaper following the October 25th, 1985 meeting and the October 25, 1985 meeting in

which you were told not to respond to the builders complaints.

Is there any other statement or incident that you contend led to your involuntary termination?

MR. SCHULTZ: Objection in terms of it requires a legal conclusion. Not quite as blatant as the one a moment ago. Answer that one as best you can, John.

A. When Mr. Riley held his meeting with the staff prior to moving downstairs, he dismissed everyone except the inspections people. And at that time he informed the inspections people, inspectors, plans reviewer, myself, that we needed to create a better image in the Inspection Department, a better working relationship with the builders, I think it was some connection to that.

He said that we could not deal with the builders like the Code would in Richmond or whatever other county. That we had to bring it down to a level of the "Good Old Boys" in Frederick County. Instead of writing correction orders, write suggestion lists or helpful hints.

At that time I informed Mr. Riley, I started stating that the State Code did not allow for that. It had specific guidelines to address Code violations. And at that point, as he did many times, he got upset with me for quoting the Code. He said, "I don't want to hear any more about that, I don't want to hear any more about that. Richmond does not tell Frederick County how to run their business."

And that's what I ran into every ...just about every time that I had to

deal with Mr. Riley on a Code related situation where he was getting pressure from somewhere else other than just himself.

* * *

Pages 136 - 138:

Q. How many different occasions do you think you heard Riley say Richmond doesn't control Frederick County?

A. Probably over the course of four years, a dozen. He would say it every time that we were involved in a Code matter and I would start quoting the State Code he would say, "I've heard enough of that, I don't want to hear any more of it. Richmond doesn't tell Frederick County how to run their business."

Q. Notwithstanding those statements from the County Administrator you still

properly, but thoroughly, enforced the Building Code during your entire tenure?

A. Yes, I did, to the best of my ability and knowledge.

Q. And you feel that their placing you on probation on September 30th, 1986 was in retaliation for your exercise of your duties to properly, but thoroughly, enforce the Building Code as you've described?

A. Yes.

MR. CAIRNS: Objection to the form of the question.

Q. And that was the principal reason that caused you to resign on September 30th, the wrongful placement on probation?

A. Yes.

MR. CAIRNS: Objection to the form of the question.

Q. Mr. Dennison, except for the fact that you continued to properly, but thoroughly, enforce the Building Code, was there any other reason that you knew of which would motive the County of Frederick and Mr. Riley to, in fact, put you on probation on September 30th, 1986?

MR. CAIRNS: Objection to the form of the question.

A. No, I don't.

Q. And you believe that was their motivation, because you were properly, but thoroughly, enforcing the Building Codes in terms of putting you on probation on that date?

MR. CAIRNS: Objection.

Q. Is that correct?

A. Yes.

AFFIDAVIT OF JAMES PITZVADA
DATED NOVEMBER 13, 1989

STATE OF VIRGINIA, At Large

Town of Front Royal, To-wit:

This day personally appeared before me, Samuel D. Shumate, a Notary Public in and for the State of Virginia, at large, James Pitzvada, who, after being first duly sworn, states the following:

1. That I was a Building Inspector II for the County of Frederick, Virginia from July, 1986 until April, 1989. As a building inspector it was my responsibility to make inspections regarding compliance with the Virginia Uniform Statewide Building Code.

2. That I, James Pitzvada, honorable consider Mr. Kenneth Coffelt a fine and gentle human being.

3. That during the period January, 1987 through January, 1989, on approximately 25 different occasions I told Kenneth Coffelt, the building Official for Frederick County, about instances that I observed where the inspections done by third party inspectors in Frederick County were not being properly done and in connection therewith I told Kenneth Coffelt that the third party inspectors (and these people were doing approximately 20% of the inspections in Frederick County) were not properly enforcing the Building Code. When I would tell Mr. Coffelt about the fact that the third party inspectors were not properly enforcing the Code he would tell me "my hands are tied - there is nothing I can do about it".

4. In approximately February, 1989 when the County of Frederick finally went away from the third party inspections we (building inspectors) were told by Kenneth Coffelt that we should "be easy and don't enforce the Code very hard on people, (especially builders) who had been using third party inspectors".

5. That in early 1989 I did an inspection on a house being built for Michael Stiles, Building Permit #17039 (the brother of kenneth Stiles, the Chairman of the Frederick County Board of Supervisors) and wrote a correction order. The window in one of the bedrooms on the second floor of such house did not meet the emergency egress requirements of the Uniform Statewide Building Code (CABO I and II Family

Dwelling Code Section R211). I issued a correction order listing several items that had to be corrected in order to pass inspection. When I returned to the office, after issuing such correction order I was told by Kenneth Coffelt that Mr. Ken Stiles had called in regards to the correction order that I had written for his brother and that I "should have known better than that - that he (Michael Stiles) is the brother of the Chairman of the Board of Supervisors". The correction order that I issued was confiscated along with the permit folder and locked up in a filing cabinet in Mr. Coffelt's office. I was told that he would handle the corrections himself. Prior to the inspection of Michael Stiles' house we inspectors were told by Mr. Kenneth Coffelt that there were not

to be any exceptions or modifications to Section R211 (emergency egress) of the Code. In fact, Mr. Coffelt had me have a contractor (Mr. Walt Miller) tear out the same size windows as Mr. Stiles' house out of one of his houses at Lakeview because they were too small.

6. That other inspectors and I were specifically told by Kenneth Coffelt, not to enforce several specific provisions in the Uniform Statewide Building Code against certain homeowners and builders, among them:

(i) The blocking provision as contained in the Uniform Statewide Building Code (Section R602.4, I and II Family Dwelling Code) even though an official with the State of Virginia stated in Mr. Coffelt's office in front of Mr. Coffelt and

myself that this section of the Code was, in fact, to be enforced; and

(ii) The energy code provision as also contained in the Uniform Statewide Building Code (foaming or caulking of holes, doors and windows); and

(iii) Section R210.2, I and II Family Dwelling Code, separation of garage from residence.

7. That there are very likely hundreds of violations of the Building Code that went unreported and/or were improperly approved by the third party inspectors during the period January, 1987 through January, 1989.

8. That Kenneth Coffelt, the building official of Frederick County, on various occasions while I was working

under him as a building inspector would tell me, as well as the other inspectors, in connection with certain builders and certain violations of the Uniform Statewide Building Code by them that I should simply "let the violation go; we are not enforcing that".

9. We inspectors were told on several occasions by Mr. Coffelt not to discuss with anyone, especially the press, about the John Dennison case.

10. Mr. Coffelt kept in his office certain Building Permits which he thought should not be released to the public (such as Michael Stiles, General Electric and others) under lock and key even though this is public information.

11. In many instances Frederick County building inspectors wrote up correction orders on contractors. These

contractors would then call third party inspectors to come and inspect and were, in fact, given inspection approval by third party inspectors. This was brought to the attention of Mr. Coffelt on numerous occasions. Certificates of occupancy were signed and released by Kenneth Coffelt on these houses even though he was aware of these circumstances.

/s/ James Pitzvada
James Pitzvada, Affiant

Subscribed and sworn to before me this 13th day of November, 1989.

My commission expires May 6, 1991.

/s/ Samuel D. Shumate
Notary Public V I R G I N I A